Supreme Court, U.S.
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No. 01-0085

In The

Supreme Court of the United States

SUE RIVERS, PERSONAL REPRESENTATIVE of the ESTATE of BOBBY LYNN HARRIS, DECEASED; DANNA TAYLOR, PERSONAL REPRESENTATIVE of the ESTATE of LETRICIA KAY HARRIS, DECEASED; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CARRIE GAIL HARRIS; SUE RIVERS and DANNA TAYLOR, as CO-PERSONAL REPRESENTATIVES of the ESTATE of CANDY MICHELLE HARRIS; DELLA RUTH HARRIS; and EDGAR BLANKENSHIP,

Petitioners,

v.

BILL SKINNER and BILLY BLUNT,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Twelfth Judicial District Of Texas

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In responding to a domestic disturbance call, Deputy Blunt informed Knight of Croteau's intent to press trespassing charges if Knight did not vacate her property. Knight, who was allegedly intoxicated at the time, chose to drive himself away. A short time later, Knight caused an accident which resulted in the deaths of the Harrises. The Texas Court of Appeals concluded that Deputy Blunt's actions did not violate the Harrises' Fourteenth Amendment rights. Was this holding in error? If not, were Deputy Blunt and Sheriff Skinner nevertheless entitled to qualified immunity on the basis that those rights were not clearly established at the time of the incident?

LIST OF PARTIES AND RULE 29.6 LIST

The parties to the proceeding below were the Petitioners Sue Rivers, Personal Representative of the Estate of Bobby Lynn Harris, Deceased; Danna Taylor, Personal Representative of the Estate of Letricia Kay Harris, Deceased; Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Carrie Gail Harris; Sue Rivers and Danna Taylor, as Co-Personal Representatives of the Estate of Candy Michelle Harris; Della Ruth Harris; and Edgar Lee Blankenship, the Respondents Bill Skinner and Billy Blunt, and the Respondents' co-Defendant Wood County, Texas.

None is a corporation with parent companies or non-wholly-owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents Bill Skinner and Billy Blunt respectfully request that this Court deny the petition for writ of certiorari in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Twelfth Court of Appeals District at Tyler, Texas, can be found online at *Wood County v. Rivers*, No. 12-00-00070-CV, 2000 Tex. App. LEXIS 8653 (Tex. App. – Tyler 2000, pet. denied). While the decision is designated for publication in the Southwestern Reporter, no citation has been determined. The Court of Appeals' opinion is reprinted in the appendix to the petition at pages App. 1 through App. 14.

JURISDICTION

The judgment of the Tyler Court of Appeals was rendered on December 29, 2000. The Supreme Court of Texas denied the petitioners' petition for review on May 25, 2001, and denied the petitioners' motion for rehearing on June 28, 2001.

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. Both are reprinted in the appendix to the petition at pages App. 23 through App. 25.

STATEMENT OF THE CASE

(a) Statement of Facts

The parties' differences regarding the facts in this case are *primarily* confined to the detail necessary to resolve the narrow issues that were before the Tyler Court of Appeals, and in turn, this Court. Nevertheless, the respondents offer clarification of particular factual points, which represent rather flagrant misrepresentations of the facts on the petitioners' part.

This suit arises out of a tragic accident in which a family of four lost their lives to a drunk driver, Richard Royce Knight. The Harrises were traveling northbound on State Road 14 in Wood County, Texas, on the evening of July 27, 1997, when the pickup truck in which they were riding was struck by Knight, who failed to observe the stop sign on Farm-to-Market Road 2088. (C.R. 20-27). The Harrises and Knight all died as a result of the collision. (C.R. 179). Knight's blood alcohol content was 0.17% at the time of the accident. (C.R. 22-23).

Prior to the accident, Wood County Deputy Sheriff Billy Blunt had responded to a disturbance call at the home of Kathryn Croteau. (C.R. 20). There he encountered Knight and eventually learned that Knight had

consumed four beers over the course of a few hours. (C.R. 141). Deputy Blunt did not, however, observe any signs that led him to believe that Knight was intoxicated.[1] (C.R. 142). Distraught over Knight's belligerent displays of jealousy and fearing that he would start a fight with her other guests, Croteau insisted that Knight leave or she would press trespassing charges. (C.R. 157, 159-60). Deputy Blunt informed Knight of Croteau's position, and Knight left the premises. (C.R. 159, 162-63). According to one witness, Deputy Blunt said later that he actually told Knight to leave the scene. (C.R. 184). Shortly thereafter, the accident occurred.

The record contains no evidence that Deputy Blunt ordered Knight to drive his vehicle. At best for the petitioners, the record contains evidence that Deputy Blunt told Knight, who was intoxicated, to leave Croteau's property. The petitioners, however, have gone beyond the record to represent to the Court that the facts of this case actually establish something far more sinister.

For example, the petitioners cite page 188 of the clerk's record for the proposition that "Knight was so

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[1] While the petitioners assert that Knight was "obviously and unquestionably drunk," that his "speech was slurred," and that "he was unable to walk straight," it is clear from their record references that such observations were not made by Deputy Blunt at the scene but earlier in the day by Knight's sister, who professed special knowledge of her brother's status of sobriety. (C.R. 178). Deputy Blunt testified that, when he encountered Knight at Croteau's home some time later, Knight's eyes were clear, his speech was fine, and his balance was good. (C.R. 142). The petitioners provided no evidence to contradict Deputy Blunt's assessment of Knight at the relevant time.

obviously drunk that Blunt saw no need to take a few moments to administer routine and simple field sobriety tests." (Pet. at 3). Actually, page 188 contains Deputy Blunt's answers to requests for admissions, in which he merely admits that he never asked Knight to submit to a field sobriety test. (C.R. 188). There is no indication, either through the requests themselves or Deputy Blunt's answers, as to his motivation for choosing not to field test Knight; in fact, on the very same page of the record, Deputy Blunt denied believing Knight to be intoxicated. (C.R. 188).

The petitioners further suggest that Deputy Blunt "insisted that Knight drive his vehicle onto public roads" (indeed, that he "threatened to arrest Knight if he refused to drive himself home") and that Knight "protested" that he had been drinking because he "recognized that he was not fit to drive." (Pet. at 3). Once again, these statements are not borne out by the record.

In the first instance, the evidence shows that Deputy Blunt told Knight only that if he did not leave Croteau's property, Croteau would have him arrested for trespassing. (C.R. 159-160, 184). There is no evidence that Deputy Blunt physically put Knight into the truck or even told him to get inside, much less that Deputy Blunt actually told Knight to drive. Nowhere in the record does anyone suggest that Knight had to drive his truck in order to leave the premises. Knight was free to walk off of Croteau's property had he felt that he was not capable of driving, or he could simply have requested that Deputy Blunt or someone else provide him with a ride home.

In the second instance, the fact that Deputy Blunt did not learn that Knight had consumed alcohol until after he

informed Knight of Crōteau's intentions is a far cry from the protest of drunkenness on Knight's part to which the petitioners refer.

(b) Course of Proceedings and Dispositions Below

Although the petitioners have, for the most part, accurately described the proceedings below, their treatment of the Court of Appeals' decision is unfair and distorted. The Court of Appeals did not affirmatively "conclude[ ] that a reasonable jury could find that Deputy Blunt had intentionally and knowingly ordered a drunk onto Wood County roads just moments before the drunk ran a stop sign and killed a family of four." (Pet. at 6). What the Court of Appeals actually said is that "[the petitioners'] summary judgment evidence shows that Blunt, when he told Knight to leave the premises, essentially instructed Knight to drive his vehicle while intoxicated. Blunt denies this and claims that he did not observe any signs that Knight was intoxicated, but for the purposes of summary judgment analysis all evidence favoring [the petitioners] will be taken as true." (Pet. App. 2-3).

REASONS FOR DENYING THE WRIT

Nothing in the Tyler Court of Appeals' disposition of this case warrants review by this Court. The decision neither resulted from a split among the circuits of the United States Courts of Appeal nor created a conflict between state courts of last resort. Neither did the Tyler Court of Appeals decide an important federal question in conflict with a relevant decision of this Court. In fact, the

Tyler Court of Appeals' decision in this case is directly in keeping with this Court's pronouncements regarding Fourteenth Amendment constitutional tort law.

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR THIS COURT TO ADDRESS THE PETITIONERS' AFFIRMATIVE GOVERNMENTAL COERCION THEORY, BECAUSE THAT THEORY WAS NOT PROPERLY RAISED IN THE TRIAL COURT.

The petitioners go to great lengths to present their case under a theory of affirmative exercise of governmental authority to coerce a private citizen to commit a life-threatening crime, condescendingly chastising everyone from the Tyler Court of Appeals to the respondents for failing to recognize it as such. (Pet. at i, 7-8). That is not, however, the theory under which the petitioners properly presented their lawsuit to the trial court. Instead, the petitioners averred before the trial court that Deputy Blunt "created, or especially contributed to the creation of a danger, or rendered [the petitioners'] Decedents more vulnerable to a danger of being killed or seriously injured by said Defendant Richard Royce Knight by his operation of a motor vehicle in a state of intoxication." (C.R. 31). No theory of affirmative governmental coercion of unlawful private activity was properly pled, nor was any such theory raised by the petitioners in response to the respondents' motion for summary judgment.

In this Court, the petitioners have taken pains to distance themselves from the state-created danger theory that they pled below. That theory is not encompassed by

the Questions Presented (Pet. at i) and, therefore, is not before the Court. *See* Sup. Ct. R. 14.1(a).

The petitioners' affirmative coercion theory represents no more than an attempt by counsel to transform this case on appeal in an attempt to suggest conflict between the Tyler Court of Appeals' decision and this Court's Fourteenth Amendment jurisprudence – thereby attempting to meet this Court's consideration criteria. *See* Sup. Ct. R. 10(c). This Court will not, however, consider an issue not properly presented to the trial court. *See McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 249 (1949). Accordingly, the petitioners' affirmative coercion theory is not properly available for this Court's consideration in this case, and their petition for a writ of certiorari should be denied.

II. EVEN IF PETITIONERS' AFFIRMATIVE GOVERNMENTAL COERCION THEORY HAD BEEN PROPERLY RAISED IN THE TRIAL COURT, THE DECISION OF THE TYLER COURT OF APPEALS WOULD NOT CONFLICT WITH THIS COURT'S FOURTEENTH AMENDMENT JURISPRUDENCE BECAUSE DEPUTY BLUNT'S CONDUCT DID NOT RISE TO A CONSTITUTIONALLY CULPABLE LEVEL.

This Court has recognized time and time again that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' " *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). "[T]he Due Process Clause was intended to prevent government officials 'from abusing [their] power, or employing it as

an instrument of oppression.' " *County of Sacramento v. Lewis*, 523 U.S. at 846 (quoting *Collins v. City of Harker Heights*, 503 U.S. at 126 (in turn quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 196 (1989) (in turn quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)))). What the Due Process Clause does not do is "purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *see County of Sacramento v. Lewis*, 523 U.S. at 848 (quoting same).

If the petitioners had properly pursued an affirmative coercion theory in the trial court, then defining the distinction between traditional tort law and constitutional culpability would have been critical to determining Deputy Blunt's culpability in this case. Potentially culpable injurious conduct falls on a spectrum from negligent to intentional – negligence representing the lowest end, where traditional tort liability is customarily placed but constitutional liability is not, and intent to injure representing the highest end, where constitutional liability for governmental acts consistently lies. *See County of Sacramento v. Lewis*, 523 U.S. at 848-49. Between those extremes, however, is a range of conduct which will be constitutionally culpable only when, under the specific circumstances of the case, it "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. at 850.

On that range of conduct between negligence and intent to harm lies conduct amounting to deliberate indifference. *See County of Sacramento v. Lewis*, 523 U.S. at 849-50. The petitioners mistakenly assume (1) that government conduct which is deliberately indifferent is

always constitutionally culpable as a substantive due process violation (except under certain emergency circumstances, essentially limited to high speed chases or prison riots), and (2) that Deputy Blunt's conduct was deliberately indifferent.[2] (Pet. at 13 n.7). Deliberate indifference is not, however, the test for constitutional culpability for due process violations – the test is whether that conduct "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. at 846-47.

That is not to say that deliberate indifference can never be conscience-shocking. This Court has found deliberate indifference sufficient to sustain substantive due process culpability in the context of failure to provide adequate medical care for prisoners. *See County of Sacramento v. Lewis*, 523 U.S. at 850 (acknowledging that "deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial"); *Canton v. Harris*, 489 U.S. 378, 388-389 (1989) (using a deliberate indifference standard to gauge a substantive due process violation for failure to train employees regarding adequate medical care for prisoners). The Court has also recognized, however, that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and . . . preserving the constitutional proportions of substantive

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[2] Ultimately, whether Deputy Blunt's conduct was deliberately indifferent under the Due Process Clause is irrelevant in light of the fact that, as demonstrated below, Deputy Blunt's conduct was not conscience-shocking under the circumstances of this case.

due process demands *an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." County of Sacramento v. Lewis*, 523 U.S. at 850 (emphasis supplied).

The petitioners contend that Deputy Blunt was engaged in "routine police work" and therefore his conduct was egregious enough to be constitutionally culpable. (Pet. at 13 n.7). An "exact analysis of circumstances" demonstrates, however, that Deputy Blunt's conduct, while perhaps negligent, was not sufficiently egregious to state a substantive due process claim.

Deputy Blunt responded to a domestic disturbance call at the Croteau residence. The petitioners point to evidence suggesting that Knight exhibited signs of drunkenness earlier in the day, but none that Knight appeared intoxicated when Deputy Blunt arrived on the scene. In fact, Deputy Blunt testified that Knight did not exhibit any of the classic signs of intoxication. In interviewing Croteau, Deputy Blunt found her distraught over Knight's displays of jealousy and learned of her intent to press charges against Knight for trespassing if he did not vacate her property. Deputy Blunt then conveyed that information to Knight and, viewing the facts in the light most favorable to the petitioners, instructed Knight to leave.

The question before the Court, then, is whether handling a domestic disturbance call by sending the source of the problem on his way amounts to deliberate indifference that shocks the conscience. Did Deputy Blunt's failure to recognize Knight's intoxication and his subsequent instruction to Knight (not that Knight drive but

merely that he leave Croteau's property) rise to the level of egregious conduct that courts should deem (1) closer to intent to injure the Harrises than to negligence and (2) so much closer to intent to injure that it shocks the conscience? It did not.

Even if, hypothetically, Deputy Blunt had known to a certainty that Knight was intoxicated, it could not be said that he knew, much less intended, that Knight would choose to drive home and that the Harrises would be injured. Deputy Blunt had no way of knowing that the Harrises (or anyone else for that matter) would be on the road, nor that if Knight were to drive home while intoxicated he would join the ranks of those intoxicated drivers who kill rather than the countless intoxicated drivers who manage to avoid serious incident. In the absence of such knowledge, any instruction that Deputy Blunt might have given to Knight to leave or face arrest cannot amount to more than a negligent act, and a negligent act does not constitute a substantive due process violation. *See County of Sacramento v. Lewis*, 523 U.S. at 848 (deeming "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process").

In discussing when deliberate indifference is insufficient to shock the conscience, this Court has shown its conscience less apt to be shocked where the conduct in question arises in law enforcement situations involving "obligations that tend to tug against each other." *County of Sacramento v. Lewis*, 523 U.S. at 853 (discussing the dual obligations of prison guards to restore order without demonstrating a lack of restraint *and* the responsibility of police in a chase situation to apprehend suspects while not unnecessarily endangering the suspect or

bystanders). Here Deputy Blunt was faced with competing needs for safety on the part of the motoring public on the one hand and a property owner who felt threatened enough by Knight to call the police on the other. One is forced to wonder what the result would have been if Deputy Blunt had allowed a belligerent Knight to remain on the Croteau premises without comment, and further disturbance had ensued. Could that, too, not have led to a different kind of tragedy for which the respondents would be called to court by a different bereaved family?

Deputy Blunt was called on in the course of his duty to put an end to a disturbance, and that is what he did. He was not a guard leisurely considering provision of medical treatment for a prisoner in custody; he was a law enforcement officer, alone in the field at night, assessing and responding to a potentially volatile domestic disturbance. *Cf. Graham v. Connor*, 490 U.S. 386, 397 (1989) (recognizing that "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving").

Deliberate indifference does not shock the conscience in this instance because Deputy Blunt's actions arose out of his field evaluation (whether right or wrong) of the proper balance between the need to conclude a disturbance, diffusing the possibility of immediate danger to Croteau and her guests (and potentially to Knight himself), and the array of harm that might have resulted from instructing Knight to leave.[3] Because Deputy Blunt's

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[3] If a disturbance participant's potential to injure others makes instructing him to leave the scene of a disturbance

conduct, while possibly negligent, was not conscience-shocking, the Tyler Court of Appeals correctly determined that it will not support a substantive due process violation. The petition for a writ of certiorari should therefore be denied.

III. THE TYLER COURT OF APPEALS REACHED THE PROPER RESULT BECAUSE THE ALLEGED DEPRIVATION OF CONSTITUTIONAL RIGHTS WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE OCCURRENCE.

Even if the petitioners had properly raised their affirmative coercion theory, and even if Deputy Blunt's conduct had been sufficiently close to intent to injure to be constitutionally culpable, the respondents would be entitled to qualified immunity, because the alleged deprivation of constitutional rights was not clearly established at the time of the occurrence. The issue of qualified immunity "turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citations omitted); *see*

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constitutionally culpable, then law enforcement officers will face an impossible conundrum. Unless and until Knight refused to leave the premises after notice to do so, Deputy Blunt had no basis under Texas law to arrest Knight. TEX. PENAL CODE § 30.05. Nor could Blunt force Knight to accept a ride home. (Query whether, in any event, this Court wants to constitutionally obligate law enforcement officers to operate a volunteer taxi service.) Ultimately, then, Deputy Blunt's only option was allegedly to stand back and allow the disturbance to escalate.

Wilson v. Layne, 526 U.S. 603, 614 (1999). To be "clearly established" for qualified immunity purposes,

> the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that **in the light of pre-existing law the unlawfulness must be apparent**.

Wilson v. Layne, 526 U.S. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. at 640) (emphasis supplied).

In support of their affirmative coercion theory, the petitioners cite cases arising in a variety of contexts and under a variety of constitutional provisions, but none considering allegations of substantive due process violations by law enforcement officers. For example, the petitioners cite *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), for the proposition that "state officials are responsible for private decisions when they have 'exercised coercive power' or 'provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State.' " (Pet. at 15). The Court will note that *Blum* arose out of a claim of procedural rather than substantive due process under the Fourteenth Amendment. 457 U.S. at 996-97. Furthermore, *Blum* concerned private nursing home patients who alleged that they had not received certain procedural safeguards in conjunction with decisions by the home's utilization review committee to transfer them to a lower level of care, which in turn led to the reduction in their Medicaid

benefits. 457 U.S. at 994-96. This Court concluded in *Blum* that there were insufficient indicia of state action to implicate the Fourteenth Amendment simply because the State acted in accordance with private decisions in adjusting Medicaid benefits. 457 U.S. at 1005.

In addition to *Blum*, the petitioners cite *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987), for the proposition that "governmental coercion or encouragement required before private decision will be deemed a governmental decision." (Pet. at 15-16). *San Francisco Arts* considered whether the United States Olympic Committee was a governmental actor for the purposes of evaluating a Fifth Amendment discrimination claim. 483 U.S. at 542. In that instance, this Court found that the Committee's decision to enforce its exclusive right to use the term "Olympic," thereby denying San Francisco Arts & Athletics the opportunity to sponsor an event entitled the "Gay Olympic Games," "simply is not a governmental decision." 483 U.S. at 547 (emphasis supplied).

While both *Blum* and *San Francisco Arts* include recitations of some general principles concerning governmental liability for private decisions made under the influence of governmental coercion, neither case includes a holding to that effect. *See Blum v. Yaretsky*, 457 U.S. at 1004; *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. at 546. Not only did this Court find no such coercion in either case, but neither opportunity was utilized to further explain the general principles recited or provide examples of coercion sufficient to impute liability. Furthermore, neither case is (1) remotely factually similar to the case at bar or (2) decided

under the substantive due process component of the Fourteenth Amendment – the constitutional provision at issue here.[4]

The respondents do not profess to be constitutional scholars, nor does the Constitution require them to be. A reasonable law enforcement officer cannot be expected to sift through the pile of Establishment Clause, equal protection, and procedural due process cases involving finances of nursing home patients, the use of confessions against criminal defendants, and the use of the term "Olympics" by homosexual interest groups to determine that they should refrain from handling domestic disturbance calls by sending the source of the problem away because that individual could injure a third party after leaving.

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[4] Likewise, this Court's other cases relied on by the petitioners in support of their affirmative coercion theory are equally inapplicable. *See Lee v. Weisman*, 505 U.S. 577, 631 (1992) (**First Amendment** decision finding a school's endorsement of religion, not their coercion of a private actor, to violate the Establishment Clause); *Arizona v. Fulminante*, 499 U.S. 279, 283-88 (1991) (**Fourteenth Amendment** decision finding **harmless error** in admission of a coerced confession obtained, not by a mere private citizen, but by a paid FBI informant); *Coolidge v. New Hampshire*, 403 U.S. 443, 488-90 (1971) (**Fourth Amendment** decision finding **no state action** in support of a constitutional violation when the spouse of a criminal defendant cooperated with police); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (**Sixth Amendment** decision prohibiting the use of a confession obtained by a co-defendant turned federal agent against a defendant following his indictment in the absence of counsel).

This is particularly true in light of the Sixth Circuit's decision in *Foy v. City of Berea*, 58 F.3d 227 (6th Cir. 1995), decided prior to the incident at issue. *Foy* held that a command to young adults known to be under the influence of alcohol to drive away or face arrest – a command indistinguishable from that alleged in this case by the petitioners – was not an arbitrary exercise of state power, and, consequently, not a violation of substantive due process. *See* 58 F.3d at 231 ("The officers may have used bad judgment in telling Foy and Phillips to get in the car and leave, but this command was not an example of arbitrary exercise of the state's power."). Where a circuit-level opinion exists finding no constitutional violation on virtually indistinguishable facts, and no contrary opinion exists on comparable facts, the existence of a violation cannot possibly be clearly established for qualified immunity purposes. To the extent that this Court would find that Deputy Blunt's conduct violated the Harrises' substantive due process rights, those rights were not clearly established at the time of the incident. Hence the respondents are entitled to qualified immunity, and the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied in this case.

Respectfully submitted,

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